In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 5-11) is reported at 167 Ct. Cl. 598, 337 F. 2d 651.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1966 (App. B, *infra*, pp. 12-13). On

February 24, 1967, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 1, 1967. We invoke the jurisdiction of this Court under 26 U.S.C. 1255(1).

STATUTES AND REGULATIONS INVOLVED

Sections 901(a) and (b)(1) and 903 of the Internal Revenue Code of 1954, and Section 1.903-1 of the Treasury Regulations (1954 Code), are printed in Appendix C, *infra*, pp. 14-16.

QUESTION PRESENTED

The Internal Revenue Code of 1954 permits taxpayers to credit against their income tax any foreign income tax (§ 901(b)(1)) or "tax paid in lieu of a tax on income * * * otherwise generally imposed by" the foreign country (§ 903).[1] The question presented is whether taxes imposed by Canada and its provinces on the premiums received by life insurance companies are taxes "in lieu of" income taxes within the meaning of the latter provision.

STATEMENT

Respondent, a mutual life insurance company incorporated in the State of New Jersey, conducted business in Canada and claimed credits against its federal income tax liability for premiums taxes paid to the Dominion of Canada and the Province of Quebec for the years 1950 through 1956, and to the Prov-

[1] The 1939 Code contains similar provisions (see § 131(a) and (h)), which are applicable to some of the taxable years involved in this case.

ince of Ontario for the years 1950 and 1951 (App. A, *infra*, pp. 5-6). In this action for refund of federal income tax payments, the Court of Claims held (App. A, *infra*, pp. 10-11) that the premiums taxes were "in lieu of" the income taxes imposed by the various Canadian jurisdictions, within the meaning of Section 131(h) of the Internal Revenue Code of 1939 and Section 903 of the Internal Revenue Code of 1954 (App. C, *infra*, p. 15), and hence that Prudential was entitled to credit its premiums-tax payments against its federal income tax liability, resulting in a refund to Prudential of more than $6 million (see App. B, *infra*, pp. 12-13). The reasoning of the Court of Claims was the same as in its decision in *Equitable Life Assurance Soc.* v. *United States*, 366 F.2d 967, pending on petition for a writ of certiorari, No. 1144, this Term, a case involving the identical question.

REASON FOR GRANTING THE WRIT

Like No. 1144, this Term, *United States* v. *Equitable Life Assurance Soc.*, this case presents the question whether an American mutual life insurance company may credit premiums taxes paid in Canada against its federal income tax liability because it is exempt from Canadian income taxes. Our reasons for believing that the question is a substantial one meriting review by this Court are set forth in our petition for certiorari in No. 1144 and need not be repeated here.[2]

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[2] We have served a copy of that petition on the instant respondent.

CONCLUSION

Since the issue here is identical to that in No. 1144, we believe it would be appropriate for the Court to defer action on the instant petition until final disposition of No. 1144 and then to dispose of the instant petition summarily in conformity with the Court's disposition of No. 1144.

Respectfully submitted.

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MARCH 1967.

APPENDIX A

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

[Nos. 202-63, 247-63, 248-63, 249-63, 250-63, 251-63 and 252-63. Decided October 16, 1964]

On Plaintiff's and Defendant's Motions for Partial Summary Judgment

Francis A. Goodhue, Jr. for plaintiff. *Arthur E. Schmauder, Frank G. Koch; John H. Perkins, Jr., Peter J. Sturtevant, Dewey, Ballantine, Bushby, Palmer & Wood* of counsel.

Martin B. Cowan, with whom was *Assistant Attorney General Louis F. Oberdorfer* for defendant. *C. Moxley Featherston, Lyle M. Turner, Philip R. Miller* and *Thomas A. Troyer* on the brief.

Before JONES, *Senior Judge,* WHITAKER, *Senior Judge,* LARAMORE, DURFEE, and DAVIS, *Judges.*

DURFEE, *Judge,* delivered the opinion of the court:

These are seven suits by the taxpayer, a mutual life insurance company, incorporated in the State of New Jersey, seeking recovery of alleged overpayments of Federal income taxes. The actions have been consolidated by order of the court. Both parties have moved for partial summary judgment on one of the issues involved, i.e., whether or not plaintiff is entitled to a foreign tax credit under sections 131 (a) and (h), and 205 of the 1939 Internal Revenue Code, and sections 841, 901, and 903 of the 1954 Internal Revenue Code.

During the years 1950 and 1951, plaintiff paid a tax, imposed by the Provinces of Ontario and Quebec, of two percent of the gross proceeds of insurance premiums collected in those years from policyholders residing in the respective provinces. From 1952 until 1956, plaintiff paid the same tax to the Province of Quebec only, Ontario in 1952 having entered into a "Tax Rental Agreement" with the Dominion of Canada, whereby Ontario agreed to refrain from levying certain taxes, including the premiums tax, in return for compensation by the Dominion. Plaintiff paid to the Dominion of Canada the same two percent tax on premiums collected in 1950 and 1951 from policyholders residing in Canada outside of the Provinces of Ontario and Quebec, and from 1952 to 1956 from policyholders residing in Canada outside the Province of Quebec. By payment of these premiums taxes, plaintiff was excused from payment of Canadian income taxes by express provisions of law within each of the three Canadian jurisdictions.

Section 131(a), as amended, of the 1939 Internal Revenue Code, the precursor of section 901 of the 1954 Code, provided a tax credit on the income tax of a domestic corporation for any income taxes paid or accrued to a foreign country during the taxable year. Section 131(h) of the 1939 Code, the precursor of section 903 of the 1954 Code, defined the term income taxes as used in section 131(a) as including a tax paid in lieu of a tax upon income imposed by such foreign country. It is plaintiff's contention in this case that premiums taxes paid by it to the Provinces of Ontario and Quebec and to the Dominion of Canada constituted a tax paid in lieu of an income tax, and therefore, that plaintiff should have been entitled to a credit on its United States income taxes.

This court in *Prudential Insurance Company of America* v. *United States*, 162 Ct. Cl. 55, 319 F. 2d

161 (1963), a case involving the same parties and identical issue, but pertaining to a different tax year (1949), held that such premiums payments were indeed taxes paid in lieu of income taxes. It remains for us now, in this case, to examine the applicable Canadian statutes from the years 1950 to 1956, and compare them to the statutes in effect in 1949, the year in issue in the previous *Prudential* case. If such a comparison shows the statutes to be identical or substantially the same, and if defendant has shown no changes in related factors or circumstances we must, under the well established rule of *stare decisis*, grant plaintiff's motion. If, on the other hand, the statutes are not the same, or if defendant has effectively shown the existence of certain related factors not known at the time of the previous case, then such nuances and/or new evidence must be evaluated before final disposition of these motions.

A reading of the Quebec statute immediately reveals the fact that the statute applicable in 1949, and the statute in effect from 1950 to 1956, were one and the same. The premiums tax in both 1949, and 1950 to 1956, were imposed by subdivision 3 of section 3 of the Quebec Corporations Tax Act (11 Geo. VI (1949), c. 33)). Section 6 of the same statute levied a seven percent income tax on certain enumerated companies. Insurance companies were not among those companies made subject to the income tax by section 6. *Cf. Prudential* case, *supra*, p. 61.

The Ontario statute applicable to income and premiums taxes in 1950 and 1951 was not the same statute that we interpreted in our prior decision. In the prior decision, we examined the Corporations Tax Act of Ontario [3 Geo. VI (1939), c. 10, as amended.] A new Corporations Tax Act of Ontario had gone into effect in 1950 (Rev. Stat. of Ont., 1950, c. 72.) While the

statutes themselves were not the same, the language of the portions of the two statutes relevant to the issues involved in the prior decision and in this case are almost identical. Section 4, subsection (1) of the 1939 Ontario Act provided that every insurance company should pay a two percent tax on life insurance gross premiums received by the company during the fiscal year from policyholders who were residents in Ontario. Section 4(1) of the 1950 Act set forth the same requirements. Section 14, subsection (1) of the 1939 Act imposed a seven percent net income tax on corporations located in Ontario. The counterpart of this section in the 1950 Act [Section 14(1)] imposed the very same seven percent tax. Finally, the specific exemption of insurance companies from paying the seven percent net income tax is found in both statutes in similar language. The exemption provision is included in section 14, subsection (3)(h) of the 1939 Act, and in section 14(3)(i) of the 1950 Act. The interworkings of these sections of the 1939 Act were thoroughly discussed in the previous case.

An examination of the Dominion of Canada statutes applicable in the previous case, and those in effect for the years in issue in the present case, shows that the earlier statutes were again either identical or very similar to the statutes involved in this case. For the years 1950, 1951 and 1952, the premiums tax was assessed under the Dominion's Excise Tax Act (Rev. Stat. of Can., 1927, c. 179, as amended.) The Canadian income tax assessment and exemption of mutual life insurance companies were included in the Income Tax Act. [11-12 Geo. VI (1948), c. 52, as amended.] These were the same statutes involved and explained in the previous case.

Plaintiff's premiums tax was assessed for the years 1953 to 1956, under a new statute, the Excise Tax

Act (Rev. Stat. of Can., 1952, c. 100, as amended.) Its language was for all intents and purposes identical to that of its predecessor. The same may be said of the language of the new Income Tax Act (Rev. Stat. of Can., 1952, c. 148, as amended), under which corporation income taxes were assessed and under which mutual life insurance companies were exempted. It too was identical to its predecessor.

Although, as we have shown, the statutes involved in this case are identical or substantially the same as those considered in the previous case, defendant contends that the present case may be distinguished from our prior holding. The thrust of this contention is focused upon the decision of the Supreme Court of Canada in *Stanley Mutual Fire Insurance Company* v. *Minister of Internal Revenue* (1953), 1 S.C.R. 442, 53 D.T.C. 1119. Defendant cites this case for the proposition that mutual life insurance companies had been exempted from income taxes on their premiums income not because of express provisions of the statutes, but because no mutual insurance company was regarded by the courts as being a profit making concern.

The issue involved in the *Stanley Mutual* case, *supra*, was whether or not a mutual *fire* insurance company was subject to income tax for the year 1947 on an amount of cash, the excess receipts including premiums earned over disbursements, which were transferred to its reserve fund. The Court held that the surplus cash was accumulated not as profit for the company, but in furtherance of the purpose of the mutual fire insurance plan, the settlement of claims or liabilities. The surplus was then held to be non-taxable.

The decision was, therefore, limited to the question of the taxability of excess receipts of a mutual *fire*

insurance company. There is certain *dicta* in the opinion which would support defendant's contention that all mutual insurance companies were, because of their structure, incapable of making any profits. The holding of the Court does not, however, contain such a broad generalization.

In actuality, mutual insurance companies were regarded under Canadian law as profit making concerns. Investment income of incorporated resident mutual fire and casualty companies was included in computing taxable income from 1947 through the period in issue. Furthermore, the *Stanley Mutual* decision, *supra*, was overturned by the Dominion Parliament in 1954 by the clear intent expressed in the enactment of section 68A of the Income Tax Act. That amendment expressly taxed mutual casualty companies on their underwriting income. It also made such liability retroactive to 1947 if such companies were nonresidents.

In light of the fact that, except for the years involved, the issue and circumstances of this case and both the United States Statutes and the Canadian statutes pertaining to the foreign tax credit are the same in all relevant respects for the years 1950 through 1956 as they were for the year 1949 involved in the previous *Prudential* case, the law of that case must govern the disposition of these motions under the rule of *stare decisis*. There is nothing to cause the court to view the prior decision as unjust or undesirable. In fact, the Government never sought reconsideration or review of that decision. The various materials defendant presents in this case fail to demonstrate that there was not a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes. On the contrary, we are persuaded by the history and

terms of the various Canadian taxing acts that these premiums taxes were paid "in lieu of" income taxes imposed on others.

Plaintiff's motion for partial summary judgment is, therefore, granted, and defendant's cross motion is denied. Partial judgment is entered for plaintiff, with the amount of recovery on this issue and the rights of the parties as to other issues raised by the pleadings to be determined by further proceedings pursuant to Rules 47(c) and 64(e).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Nos. 202-63, 247-63, 248-63, 249-63, 250-63, 251-63 and 252-63

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

ORDER

On October 16, 1964, the court rendered an opinion holding that the plaintiff was entitled to recover on the "foreign tax credit" issues and entering judgment to that effect. The determination of the amount of recovery on such issues was reserved pending further proceedings pursuant to Rule 47(c).

On November 30, 1966, the commissioner of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of the parties regarding the amounts due the plaintiff pursuant to the court's decision and pursuant to the settlements agreed to by the parties of the other issues raised by the pleadings, judgment be entered for the plaintiff in the sums indicated below, which recommendation is adopted by the court.

IT IS THEREFORE ORDERED that judgment be and the same is entered for the plaintiff in the sum of two hundred ninety-one thousand three hundred three dollars and twenty-five cents ($291,303.25), together with interest as provided by law, in case No. 202-63, in the sum of eight hundred fifty-four thousand three hundred thirteen dollars and eighty-nine cents ($854,313.89), together with interest as provided by law, in

case No. 247-63, in the sum of one million one thousand six hundred two dollars and twenty cents ($1,001,602.20), together with interest as provided by law, in case No. 248-63, in the sum of one million sixty-three thousand sixty-three dollars and fifty-three cents ($1,063,063.53), together with interest as provided by law, in case No. 249-63, in the sum of one million thirty-seven thousand six hundred eighty-four dollars and thirty-three cents ($1,037,684.33), together with interest as provided by law, in case No. 250-63, in the sum of one million one hundred ten thousand seven hundred thirty-three dollars and fifty-one cents ($1,110,733.51), together with interest as provided by law, in case No. 251-63, and in the sum of one million one hundred forty thousand eight hundred six dollars and thirty-seven cents ($1,140,806.37), together with interest as provided by law, in case No. 252-63.

BY THE COURT

/s/ Wilson Cowen
WILSON COWEN
Chief Judge

Dec 2 1966

APPENDIX C

Sections 901(a) and (b)(1) and 903 of the Internal Revenue Code of 1954 (26 U.S.C.) provide:

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) *Allowance of Credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax against which the credit is allowable. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable year under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) *Amount Allowed.*—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * *

[26 U.S.C. (1958 ed.) 901.]

SEC. 903. CREDIT FOR TAXES IN LIEU OF INCOME, ETC., TAXES.

For purposes of this subpart and of section 164 (b), the term "income, war profits, and excess profits taxes" shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States.

[26 U.S.C. (1958 ed.) 903.]

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.903-1 *Definition of taxes in lieu of income, war profits, or excess profits taxes.*

(a) *In general.* For the purposes of subpart A (section 901 and following), part III, subchapter N, chapter 1 of the Code, and section 164 (b) (6), the term "income, war profits, and excess profits taxes" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if—

(1) Such country or possession has in force a general income tax law,

(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and

(3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

(b) *Example.*—The application of section 903 may be illustrated by the following example:

Example.—The A Corporation does business in X country, which imposes an income tax upon substantially a taxable income base. The ascer-

tainment of taxable income, though not the determination of gross income, from sources in X country is found administratively difficult. The X country by decree, provides that corporations circumstanced as was the A Corporation would, in lieu of the income tax at the rate of 20 percent otherwise payable, be subject to tax at the rate of 10 percent upon the amount of gross income from X country. In accordance with such decree the A Corporation paid X country the sum of $25,000 in 1955 with respect to its tax liability to the X country for the year 1954. Such amount, subject to the applicable limitations, is available as a credit to the A Corporation as foreign income, war profits, or excess profits taxes against the United States tax liability for the year 1954.

[26 C.F.R., Sec. 1.903-1.]

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